

9/25/01

Hearing:

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July 18, 2001

TW/RLS

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OF THE T.T.A.B.**

Paper No.

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

Pelonis USA Ltd.

v.

Del-Rain Corporation

Opposition No. 97,864  
to application Serial No. 74/564,120  
filed on August 22, 1994

Alex R. Sluzas of Paul and Paul for Pelonis USA Ltd.

R. Joseph Trojan of Trojan Law Offices for Del-Rain Corporation.

Before Simms, Chapman and Bottorff, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Pelonis USA Ltd. (opposer) has opposed the application of Del-Rain Corporation (applicant) to register the design mark shown below

for portable electric heaters.<sup>1</sup>

During the time for taking testimony, both parties submitted testimony and opposer filed a notice of reliance upon various printed publications and official records (patents). The parties have filed briefs and an oral hearing was held.

In the notice of opposition, opposer asserts that applicant's mark, which we shall refer to as a circles and star design, is a functional configuration of applicant's portable electric heaters because applicant's design duplicates the size, spacing and orientation of the four disk-shaped heating elements along with the star-shaped holder of those elements in applicant's goods. Opposer alleges alternatively that if applicant's mark is not found to be functional, it is "primarily merely descriptive" because it is a representation of applicant's goods showing four heating disks separated by a star-shaped holder, which are prominent visual features of applicant's electric heaters. Further, opposer alleges that applicant has not shown that its descriptive design has acquired distinctiveness. In this connection,

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opposer alleges that since 1992 it has been importing and selling portable electric heaters similar to applicant's and that it has a right to describe its goods by the use of a circles and star design. Finally, opposer has pleaded that, if applicant's mark is found neither functional nor merely descriptive, then applicant's mark so resembles opposer's circles and star design used since 1993 in connection with the sale of opposer's portable electric heaters as to be likely to cause confusion, to cause mistake or to deceive.

With respect to this last ground of opposition, when it was pointed out to opposer's counsel at the oral hearing that opposer's brief contained no argument with respect to this issue, counsel withdrew likelihood of confusion as a ground for challenging registration of applicant's mark.

Applicant has denied the essential allegations of the notice of opposition and has asserted in its answer that its mark is an abstract design, which is only suggestive of its goods. Applicant has also asserted various affirmative defenses, which we need not discuss because they are unsupported by any evidence.

Trial Record

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<sup>1</sup> Application Serial No. 74/564,120, filed August 22, 1994,

Mr. Sam Pelonis, opposer's president, testified that opposer makes electric space heaters similar to those sold by applicant, and has done so since 1992. According to Mr. Pelonis, applicant's design mark represents the appearance of the front of applicant's disk-style space heater with four circular heating elements and the holder assembly.

Mr. Jim Ronfeld, one of applicant's founders, testified that the design here sought to be registered was first used by applicant on cooling fans. Applicant began using this design on its portable heaters in 1992. A portion of the specimen of applicant's mark filed with its application is reproduced below. According to Mr. Ronfeld, applicant's design mark is of "similar configuration" to the four disks and star-shaped holder of its heaters.

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based upon allegations of use since July 1990.

At one time, applicant was a distributor of opposer's goods as well as a licensee of opposer authorized to use the mark "Pelonis" for heaters. However, the license arrangement did not cover use of the circles and star design, which applicant here seeks to register. Applicant sells its portable electric heaters to hardware retailers.

Arguments of the Parties

According to opposer, the four circular or disk elements and star-shaped holder of applicant's heaters are prominent visual features of applicant's goods. Opposer points to the testimony of applicant's witness where he admitted that the four disk elements and the star-shaped holder are of "similar configuration" to the design mark applicant seeks to register. It is opposer's position that the four circles and the star-like design of applicant's mark depict the appearance of a characteristic of applicant's product. Because applicant's mark allegedly "duplicates" the size, spacing and orientation of the circular heating elements and the holder, and because a picture of a product that is merely a representation of the goods is merely descriptive,

opposer argues that applicant's design is merely descriptive. Opposer contends that the design immediately conveys the idea of a feature of applicant's goods to a reasonably informed customer who is familiar with the appearance of applicant's goods. Opposer also argues that applicant has not submitted any evidence of acquired distinctiveness in the application file and that, in view of use by opposer of a similar design, applicant has not shown the degree of exclusive use needed to attain acquired distinctiveness of its asserted mark.

Concerning the issue of functionality, opposer argues that the patents of record show four disk heating elements held in place by a star-shaped holder. Because the utility patent discloses the utilitarian advantages of this configuration of applicant's goods, it is strong evidence of the functionality of a configuration showing applicant's product, according to opposer. It is opposer's position that applicant's mark depicts the appearance of functional elements of applicant's goods so that it is, in effect, a functional configuration of applicant's goods.

Applicant, on the other hand argues that opposer has not established its burden of showing that applicant's

mark is merely descriptive. Applicant points to the lack of evidence, such as consumer surveys or expert testimony, demonstrating the mere descriptiveness of its design mark. It is applicant's position that its design does not immediately and directly inform the average purchaser of applicant's goods of any feature or characteristic of applicant's goods, but rather is merely a fanciful and stylized *depiction* of an aspect of its portable heaters.

With respect to the issue of functionality, applicant argues that it is not seeking to register the appearance or shape of its product but rather a fanciful and artistic rendition of an aspect of the product. Moreover, applicant contends that opposer has offered no proof of the elements of functionality, such as that applicant's design is a superior one or is less expensive to manufacture.

Discussion and Opinion

Upon careful consideration of this record and the arguments of the parties, we agree with applicant that opposer has failed to prove that applicant's design is unregistrable.

First, there can be no question that opposer has established its standing, having used a similar design and having sold similar heaters.

However, we agree with applicant that its mark is only a somewhat fanciful and stylized representation of an aspect of its heaters rather than an accurate drawing of an element or feature of its product. In this regard, we observe that a visual representation which consists merely of an illustration of the goods, or of an important feature or characteristic of the goods, is regarded as merely descriptive of those goods. See, for example, *In re Society for Private and Commercial Earth Stations*, 226 USPQ 436 (TTAB 1985)(representation of a satellite dish held merely descriptive of applicant's services) and *In re Underwater Connections, Inc.*, 221 USPQ 95 (TTAB 1983)(representation of a compressed air tank held merely descriptive of applicant's travel tour services involving underwater diving). Unlike those cases involving relatively accurate representations of products, we believe that this case falls into the category of cases where the design sought to be registered is only a somewhat fanciful or stylized depiction of a product or a product feature. See, for example, *In re LRC Products Ltd.*, 223 USPQ 1250 (TTAB



1984)(stylized hand design found not merely an illustration of the goods--gloves--and thus not merely descriptive) and cases discussed therein. Of particular note are *In re Curtiss-Wright Corp.*, 183 USPQ 621 (TTAB 1974)(design of rotary engine held to be a fanciful representation suggestive of the goods) and *In re Laitram Corp.*, 194 USPQ 206 (TTAB 1977)(design mark held not an actual representation of applicant's goods but rather a fanciful design only suggestive of those goods). Applicant's mark is not an exact representation of a feature of its goods visible through the grill but only bears a resemblance to a feature thereof.

Finally, with respect to the issue of functionality, we are in complete agreement with applicant that it is not here seeking to register trade dress in the nature of a product configuration or product design. In other words, applicant is not here claiming that a feature or shape of a feature of its product is a registrable trademark. Rather, applicant is here seeking to register a design, which is at best only reminiscent of a feature of its goods. Applicant's design mark, as a whole, cannot be said to be functional.

Decision: The opposition is dismissed.

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